guilt is far less in degree than defendant's, so as to make the doctrine inapplicable. If plaintiff's guilt is not far less, the court inquires if applying the doctrine would be contrary to public policy." *Id.* (quoting *Turner*, 704 So. 2d at 750).

Here, the Trustee alleges in its Second Amended Complaint that the Debtor, Mr. Gosman, was found to have acted with actual intent to defraud his creditors when he transferred assets to Mrs. Gosman. Therefore, Mr. Gosman's fraud appears on the face of the complaint. Because the Trustee stands in the shoes of the Debtor, I must determine whether this fraud would bar a claim by the Debtor against Peabody for negligence.

In determining whether the doctrine of *in pari delicto* applies under Florida law, I first determine whether the Debtor's guilt is far less in degree than Peabody's, based on the allegations in the Second Amended Complaint. According to the allegations, the Debtor acted with actual intent to defraud while Peabody was only negligent, and therefore I find that the Debtor's guilt is not far less than Peabody's. Second, I find no reason why applying the doctrine of *in pari delicto* in this case would be contrary to public policy.

Based on the allegations in the Second Amended Complaint, the Debtor's guilt is clearly at least as great as Peabody's, and therefore this can be resolved on a motion to dismiss. *See Edwards*, 437 F.3d at 1156 (resolving on a motion to dismiss whether doctrine of *in pari delicto* barred plaintiff's claims); *Terlecky v. Hurd (In re Dublin Secs.)*, 133 F.3d 377, 380 (3d Cir. 1998) (affirming dismissal of negligence and fraud claims on basis of *in pari delicto* where the complaint "concedes, for example, that the debtors [plaintiffs] intentionally defrauded their investors. Such purposeful conduct thus establishes conclusively that the debtors were *at least* as culpable as the defendants in this

matter.") (emphasis in original). The actual fraud of Mr. Gosman is more objectionable than the alleged negligence of Peabody. *Banco Nacional de la Vivienda v. Cooper*, 680 F.2d 727, 730 (11th Cir. 1982) ("[W]hen the choice is between the two–fraud and negligence–negligence is less objectionable than fraud."); *Besett v. Basnett*, 389 So. 2d 995, 998 (Fla. 1980) (stating that "negligence is less objectionable than fraud"). Because the Trustee has no greater rights or interests than the Debtor, the doctrine of in pari delicto bars the Trustee's claim for negligence against Peabody. Therefore, I affirm the Bankruptcy Court's dismissal of Count I of the Second Amended Complaint based on the doctrine of in pari delicto.

B. The Trustee is precluded by collateral estoppel from attempting to relitigate whether Mr. Gosman intended to defraud creditors.

Although the Trustee argues that the *in pari delicto* doctrine should not have been applied on a motion to dismiss because the Trustee should have been allowed an opportunity to show that Peabody was more at fault than Mr. Gosman, I reject this argument on the alternative ground of collateral estoppel. In determining whether collateral estoppel applies against the Trustee, "federal preclusion principles apply to prior federal decisions, whether previously decided in diversity or federal question jurisdiction." *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1285 (11th Cir. 2004); *see CSX Transp., Inc. v. Bhd. of Maint. of Way Employees*, 327 F.3d 1309, 1316 (11th Cir. 2003) ("We previously held that when a federal court sitting in diversity examines the collateral estoppel or res judicata effect of a prior federal judgment, based either on diversity or a federal question, it must apply federal common law.") (internal quotations omitted). I apply federal law

because the prior decision at issue is the federal bankruptcy court's March 7, 2005 order.[3]

Under the law of this Circuit, "collateral estoppel bars relitigation of an issue previously decided if the party against whom the prior decision is asserted had 'a full and fair opportunity' to litigate the issue in an earlier case." *United States v. Weiss*, 467 F.3d 1300, 1308 (11th Cir. 2006). In order to apply collateral estoppel, the party seeking to invoke the doctrine must establish that "(1) the issue in the pending case is identical to that decided in a prior proceeding; (2) the issue was necessarily decided in the prior proceeding; (3) the party to be estopped was a party or was adequately represented by a party to the prior proceeding; and (4) the precluded issue was actually litigated in the prior proceeding." *Id.* Furthermore, the application of collateral estoppel is proper on a motion to dismiss where the existence of collateral estoppel can be judged from the face of the complaint. *See Harley v. Health Center of Coconut Creek, Inc.*, 2007 WL 3086013, *1 (S.D. Fla. Sept. 27, 2007) (citing *Concordia v. Bendekovic*, 693 F.2d 1073, 1075 (11th Cir. 1983)).

First, I find that the issue in the instant adversary proceeding is identical to the issue decided in the prior adversary proceeding against Mr. and Mrs. Gosman. In the prior proceeding, the Bankruptcy Court determined after trial that Mr. Gosman had transferred assets to Mrs. Gosman with the actual intent to defraud creditors. In the instant adversary proceeding, the Trustee alleges that Peabody is liable for negligently advising Mr. Gosman

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[3] Although the Bankruptcy Court did not base its decision to dismiss the claims against Peabody on the doctrine of collateral estoppel, I note that the argument was made before the Bankruptcy Court. *See* Transcript of November 28, 2006 hearing at 21. Furthermore, I may affirm on any ground supported by the record. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1088 n.21 (11th Cir. 2007).

on matters involving and leading up to his transfers to Mrs. Gosman. Although the Trustee attempts to frame the issues in a way that distinguishes them from the issues already decided in the prior adversary proceeding against Mr. and Mrs. Gosman, the issues are identical. The position the Trustee takes in this case–that Mr. Gosman would have acted differently if not for the negligent advice of his lawyers[4]–would by necessity undermine the prior court's determination that Mr. Gosman acted with actual intent to defraud. Therefore, I find that Peabody sufficiently established that the issues are identical, thus satisfying the first factor in the collateral estoppel analysis.

Second, I must determine whether the issue of Mr. Gosman's intent to defraud was necessarily decided in the prior proceeding. Because intent to defraud is an element required for a finding that a debtor has fraudulently transferred assets, *see* 11 U.S.C. § 548(a)(1); Fla. Stat. § 726.105(1), I find that the second factor for collateral estoppel is also established. Indeed, both the federal and Florida laws on fraudulent transfers require a finding that the debtor had intent to defraud creditors. Because intent to defraud was an required element of the claim for fraudulent transfers brought against Mr. and Mrs. Gosman, the issue of intent to defraud was necessarily decided by the Bankruptcy Court

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[4] The Trustee argues in its Initial Brief that "[t]hese allegations and others in the Second Amended Complaint are not premised upon the advice to transfer assets which a court has found constituted fraudulent transfers. Instead, they are premised upon negligent advice given by the lawyers in advance of such transfers which, if properly given, would have been heeded, would have prevented the fraudulent transfers from having taken place." Initial Br. at 17 (emphasis added). The Trustee also argues "if the evidence were to show, for example, that the Peabody recommended certain strategies and transactions, advised Mr. Gosman to engage in such actions, did not advise Mr. Gosman that the strategies suggested were unlawful, and Mr. Gosman did not know or failed to appreciate that the transactions were unlawful, Mr. Gosman's decree [sic] of fault would not be as great as that of Peabody." Initial Br. at 21.

in the prior proceeding when it voided Mr. Gosman's transfers under both Federal and Florida law.

With respect to the third factor, the party to be estopped here is the Trustee, standing in the shoes of the Debtor. The Trustee was not only a party to the prior proceeding; the Trustee initiated the prior adversary proceeding and succeeded in having the Debtor's transfers voided as fraudulent. The Debtor was a defendant in that adversary proceeding and therefore was also a party. For the purposes of this analysis, the Trustee stands in the shoes of the Debtor, as discussed previously in this order. *See Martin v. Pahiakos (In re Martin)*, 490 F.3d 1272, 1277 (11th Cir. 2007) ("Third, it is beyond dispute that the parties in both cases are identical. Although the trustee stood in the shoes of [the debtor] during this phase of the litigation, that is no impediment to considering the parties identical in the res judicata analysis.") Therefore, I find that the third factor is satisfied because the Trustee, standing in the shoes of the Debtor, was a party to the prior proceeding.

Fourth, I must determine whether the precluded issue was actually litigated in the prior proceeding. In the prior adversary proceeding against Mr. and Mrs. Gosman, the Bankruptcy Court issued its order voiding the transfers after a trial. Because intent to defraud is an element required for a determination of fraudulent transfer, this trial involved precisely the issue of whether Mr. Gosman acted with intent to defraud creditors when he transferred assets to Mrs. Gosman. The Court found that Mr. Gosman did act with intent to defraud, and therefore, I find that the fourth and final factor required for collateral estoppel is satisfied.

Because I find that the factors required for collateral estoppel are satisfied, I

conclude that the Trustee is estopped or precluded from arguing that Mr. Gosman would have acted differently if not for the allegedly negligent advice of Peabody. This argument, by necessity, contradicts the prior determination that Mr. Gosman acted with actual intent to defraud creditors when he transferred assets to Mrs. Gosman.

Therefore, it was entirely appropriate to resolve the Trustee's claims against Peabody on a motion to dismiss. Assuming the validity of the Trustee's allegations of negligence against Peabody, the Trustee's claims for negligence must be dismissed based on in pari delicto. Mr. Gosman transferred his assets with actual intent to defraud his creditors and, as discussed previously, Mr. Gosman's actual intent to defraud outweighs Peabody's alleged negligence. Because Mr. Gosman's degree of fault is clearly greater, I conclude that the Bankruptcy Court correctly dismissed the claims based on the doctrine of in pari delicto. Therefore, I affirm the dismissal of Count I based on the additional ground of collateral estoppel.

C. The Trustee is judicially estopped from taking position contrary to former position regarding the actions and involvement of Mr. Gosman's lawyers.

Under the doctrine of judicial estoppel, "where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Allapattah Servs., Inc. v. EXXON Corp.*, 372 F.Supp. 2d 1344, 1367 (S.D. Fla. 2005) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). The doctrine is used to prevent "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Allapattah Servs.*, 372 F.Supp. 2d at